MOTION FILED
FEB 20 1987

No. 86-1153

IN THE

Supreme Court of the United States

October Term 1986

F B K REALTY CORP.

Petitioner,

—against—

PAUL A. CROTTY, Commissioner of the Department of Housing Preservation and Development of the City of New York,

Respondent.

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF *AMICUS CURIAE* ASSOCIATED BUILDERS AND OWNERS OF GREATER NEW YORK INC. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

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February 20, 1987

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MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF

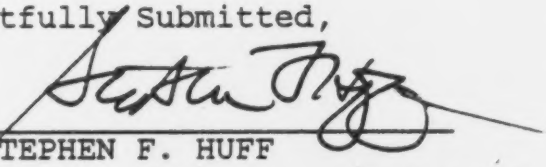
The Associated Builders and Owners of Greater New York, Inc. ("ABO") respectfully moves this Court for leave to file a brief in this case as amicus curiae. ABO is a not-for-profit corporation which represents approximately 450 persons and entities involved in the development and management of real estate in the City of New York. The consent of the attorney for the Petitioner herein has been obtained, but the attorney for the Respondent herein refused to consent to the filing of a brief by ABO.

The applicant, ABO, has an interest in this case because its members have an interest in the alienability, preservation and improvement of property within the City of New York, including the area which is embraced within the Zoning Resolution which is the subject of this action.

The Petition herein does not demonstrate that the Petitioner is necessarily a member of the class of innocent property owners whose interests are directly affected by the overly broad and confiscatory impact of the Zoning Resolution here at issue. (See page 10 of the Petition) Additionally, Petitioner's arguments do not sufficiently address the impact of the Resolution on the alienability of property as that Resolution affects such innocent property owners and which goes to the heart of the "taking without just compensation" issue under the

Fifth and Fourteenth Amendments to the United States Constitution. The applicant has no reason to believe that the argument on this point will be expanded and made complete in this Court by the parties to this action. If applicant's argument is adopted by this Court, ABO submits that the decision of the court below will be reversed.

Respectfully Submitted,

By 

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CONSENT TO FILING OF AMICUS CURIAE BRIEF

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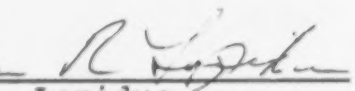
CONSENT TO FILING OF
AMICUS CURIAE BRIEF

Pursuant to Rule 36, the Petitioner in this matter, FBK Realty Corp. hereby consents to the filing by Associated Builders and Owners of Greater New York Inc. of a brief as Amicus Curiae.

By 
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BRIEF OF AMICUS CURIAE ASSOCIATED BUILDERS AND OWNERS OF GREATER NEW YORK INC.

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Brief of Amicus Curiae Associated Builders and Owners of Greater New York Inc.

INTEREST OF THE ASSOCIATED BUILDERS AND OWNERS OF GREATER NEW YORK INC.

Associated Builders and Owners of Greater New York Inc. ("ABO") is a not-for- profit corporation which represents approximately 450 persons and entities involved in the development and management of real property, including residential property, in the City of New York. By virtue of the regular dealings

in New York real estate of the persons and entities which ABO represents, these persons and entities are integrally involved with the purchase and sale of property in New York and therefore are affected by questions of alienability and the ability to maintain and/or improve residential housing which are raised by the issues in this case.

SUMMARY OF ARGUMENT

This brief supports the instant Petition because Zoning Resolution 96-109 (the "Resolution"), as construed by the Department of Housing Preservation and Development of the City of New York ("HPD"), raises important constitutional issues. The operative effect of the Resolution is not only to render property unsaleable, but to subject such property to physical deterioration, all without any concomitant benefit to the welfare of the community. The Resolution therefore

deprives the owner of the value of his property due to no fault of his own and constitutes the taking of such property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution. The Resolution also violates principles of due process by virtue of the retroactive application of the critical terms at issue herein.

ARGUMENT

THE RESOLUTION VIOLATES THE FIFTH AND FOURTEENTH AMENDMENTS IN CONSTITUTING A TAKING OF PROPERTY WITHOUT JUST COMPENSATION

The Resolution, as construed by HPD, permanently interdicts any alteration to a building within the protected district (except possibly minor repairs) by the owner of such building if, after application to HPD for an Alteration Permit, it is found that any prior owner

in the chain of title committed even one act of "harassment" at any time with respect to any tenant who resided in the building during the period that the Resolution has been operative. For example, the Resolution would preclude an owner from obtaining a permit to install a new boiler or electrical and plumbing system (21a, 50a)* if one act of harassment some time in the past was found to have been committed. This itself would prevent effective maintenance of the building and render it a deteriorating asset, thereby precluding commercial enjoyment or a viable sale, as well as harming the building's residents who the Resolution is ostensibly intended to protect.

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*Parenthetical references are to pages in the Appendix to Petition for a Writ of Certiorari

This inequitable and illogical application of the Resolution is at the heart of the Decision of the Hearing Officer (3a-8a) - which was adopted by HPD and confirmed by the Court below - which, after finding that the term "owner" was not defined in the Resolution, construed that term to include "former owners." The Decision also held that if HPD can establish that "even one act of harassment occurred" by any such former owners, a permit to perform alterations must be denied. (5a) The Decision thereby greatly expanded the scope of the Resolution from that which is apparent from its face.

The operative effect of the Resolution is not only to prevent proper building maintenance, but to render real property in the protected district unsaleable. Specifically, a purchaser of such property would be taking the

monumental risk that when, at some time in the future, he sought a permit to make alterations (which alterations would inevitably be required for operation, maintenance and refurbishing of a building), such permit would be unconditionally and permanently denied because of some isolated act of harassment in the past of which the purchaser had no knowledge or control. Under such circumstances, a prospective purchaser will surely not incur such risk and buy the property. Therefore, the prospect of a current owner being able to sell its building for any commercially realistic consideration is virtually eliminated, since no prospective purchaser could risk an investment which could literally become a deteriorating asset as a result of one unrecorded act of past "harassment" surfacing in the future.

The confiscatory effect of the Resolution as construed by HPD is therefore manifest. The Resolution literally renders unalienable any building in the district which has been denied an Alteration Permit or for which an application had not been made at the time of the prospective sale. As shown below, such result is in no fashion offset by any social benefit to the community which the Resolution purports to achieve.

In its Answer to the Petition in the original court proceeding, Respondent set forth the purported policy reason for the Resolution by stating "This provision is intended to remove the economic incentive to the harassment of residents of the [protected] neighborhood." (38a) If the Resolution were indeed limited to acts of harassment by the current owner making application for an Alteration

Permit or even to those current owners who, directly or indirectly, have acted in concert with a former owner committing acts of harassment, such policy would be understandable. However, it is difficult to conceive how a current owner who had absolutely no knowledge or reason to know of past acts of harassment will be deterred from himself committing such acts by enjoining him from the ability to make alterations to his building because of his predecessor's conduct. Far from achieving the stated policy, the operative effect of the Resolution is simply to place such an enormous economic risk on a prospective purchaser - the risk that such purchaser may not be able to make alterations in the event of a future finding of past harassment - as to render a building unmarketable. Indeed, this state of affairs can only contribute to the deterioration of any given

building and by extension to deterioration of the neighborhood. Thus, ironically the Resolution actually has a harmful effect on tenants, by eliminating what could be suitable housing facilities.

In his Decision, the Hearing Officer likewise sought to deal with the intended policy of the Resolution; but, like Respondent's Answer quoted above, his analysis fell short of the mark. After indicating that the Petitioner sought to limit the term "owner" to the current owner, the Decision then went on to state that "such a narrow definition would do no justice to the statute [i.e., Resolution 96-109] since an owner who willfully harassed tenants of a given building would then only have to transfer title to some other nominal owner in order to avoid the statute." (4a) However, the policy which that concern

seeks to foster could easily and more directly be protected by providing for a mechanism for HPD to ascertain whether a given transfer of title was made to evade the Resolution. The solution clearly must not be an overbroad and confiscatory penalty to an innocent owner who had no reason to know of past harassment when that owner purchased his property.

Significantly, a solution to accommodate both needs was implemented by this very Respondent in 1983 in remarkably similar circumstances, presumably to avoid the same constitutional infirmity which is inherent in the Resolution here at issue. In Sadowsky v. City of New York, 732 F.2d 312 (2d Cir. 1984), the Second Circuit affirmed the District Court's ruling that a New York City Local Law did not constitute the taking of property without just compensation. That Local

Law governed the renovation and demolition of single-room-occupancy buildings. It required a certificate from HPD that no harassment of tenants had occurred for a three-year period preceding application for a permit for renovation or demolition. In relevant part, the Law permitted a waiver of said certificate if HPD found that the purchaser or owner of record was not the owner when the harassment took place and did not participate in or encourage the harassment, and that the purchase was bona fide and not intended to evade the statute. Id. at 315.

In short, the Local Law which was the subject of Sadowsky had a three-year duration for acts of harassment and expressly provided for a waiver of its terms to protect innocent purchasers and to avoid a confiscatory result. Unlike that Law, the Resolution here at issue

permanently prohibits alterations upon the finding of harassment and does not protect a purchaser who is totally innocent of such harassment. As shown above, such a restriction effectively interdicts the alienability of the property, since no purchaser is likely to assume the economic risk that he will not be able to alter his building in the event of a future finding that a single act of harassment had occurred in the past. Also, the Resolution will preclude an innocent owner from making meaningful alterations and improvements, thereby rendering it a deteriorating asset.

As shown above, the Resolution in overall operation will inevitably have a devastating adverse impact on the investments of property owners in the protected neighborhood, as it constitutes an unconstitutional taking of their property See, e.g., Penn Central

Transportation Company v. City of New York, 438 U.S. 104, 124 (1978) ("The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations."); Agins v. City of Tiburon, 477 U.S. 255 (1980). Equally important, the Resolution will ultimately have the effect of removing otherwise viable - and badly needed - residential facilities.

In construing this Court's line of cases addressing themselves to whether a zoning ordinance constitutes the taking of property without just compensation, the Second Circuit has held the key question to be whether a property restriction is so burdensome as to inhibit others from purchasing the property for the permitted uses. See Park Avenue Tower Associates v. City of

New York, 746 F.2d 135, 139 (2d Cir. 1984), cert denied sub. nom. 40 Eastco v. New York, 470 U.S. 1087 (1985); Sadowsky v. City of New York, id. at 318; Pompa Construction Corp. v. City of Saratoga Springs, 706 F.2d 418, 424 (2d Cir. 1983). Here, the operative effect of the Resolution clearly is to render affected property unalienable and subject to deterioration. The Resolution is demonstrably infirm and should be stricken.

THE RETROACTIVE APPLICATION OF THE RESOLUTION VIOLATES DUE PROCESS

Even though Petitioner took title to the subject premises in October, 1983 (6a), Respondent's definition of the term "owner" to include the acts of past owners -- by virtue of which definition Petitioner has been penalized -- did not come into effect until 1984. Respondent

is therefore impermissibly giving a retroactive application to the especially "harsh and oppressive" consequences resulting from its belatedly-formulated definition. Under such circumstances, this ex post facto application of the Resolution as defined violates the due process clauses of the Fifth and Fourteenth Amendments. See Louis Vuitton S.A. v. Spencer Handbags Corp., 765 F.2d 966, 972 (2d Cir. 1985).

This additional constitutional infirmity precludes the application of the Resolution as presently - and broadly - defined to Petitioner and to any other affected owners who took title to their properties prior to the effective date of the relevant definition in 1984.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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